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11 New York, NY 10036
Tel: 212.556.2100
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13 Attorneys for Defendant
GOOGLE INC.

14
15 ORACLE AMERICA, INC.,

20 Plaintiff,

21 v.

22 GOOGLE INC.,

23 Defendant.

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18 Case No. 3:10-cv-03561-WHA

19
20 **DECLARATION OF DANIEL PURCELL
IN SUPPORT OF GOOGLE INC.'S
MOTION TO STRIKE TWO
"REBUTTAL" DAMAGES REPORTS BY
DR. SERWIN**

21 Judge: Hon. William Alsup

22 Date Comp. Filed: October 27, 2010

1 I, Daniel Purcell, declare as follows:

2 1. I am a partner in the law firm of Keker & Van Nest LLP, counsel to Google Inc.
 3 (“Google”) in the present case. I submit this declaration in support of Google Inc.’s Motion to
 4 Strike Two “Rebuttal” Damages Reports By Dr. Serwin. I have knowledge of the facts set forth
 5 herein, and if called to testify as a witness thereto could do so competently under oath.

6 2. On October 10, 2011, Oracle America, Inc. (“Oracle”) served four expert reports
 7 on Google from its damages experts. Two of the reports were authored by Dr. Iain M.
 8 Cockburn, titled “Reply Report of Dr. Iain M. Cockburn To The Expert Report of Dr. Alan J.
 9 Cox” and “Reply Report of Dr. Iain M. Cockburn Replying To Dr. Gregory K. Leonard.” The
 10 other two reports were authored by Dr. Kenneth S. Serwin, titled “Rebuttal Report of Kenneth S.
 11 Serwin To The Expert Report of Alan J. Cox” and “Expert Rebuttal Report of Dr. Kenneth
 12 Serwin To The Expert Report of Dr. Gregory Leonard.” Prior to October 10, 2011, Dr. Serwin
 13 had never served an expert report in this case.

14 3. Prior to October 10, 2011, the parties generally followed a standard procedure in
 15 serving expert reports, which procedure was first established in the Court’s November 19, 2010
 16 order. Each party served opening reports on issues for which it had the burden of proof—Oracle
 17 on its patent and copyright claims and Google on patent invalidity and its copyright affirmative
 18 defenses. Then, after the responding party served opposition reports, the party with the burden
 19 of proof served reply reports from its original experts.

20 4. With respect to copyright issues, because Oracle has the burden of proof on
 21 liability and Google the burden on its affirmative defenses, both parties served three reports—
 22 opening, opposition, and reply—from their respective experts. Oracle’s expert reports from
 23 Dr. John Mitchell were entitled “opening,” “report in opposition” and “reply” report. Google’s
 24 expert reports from Dr. Owen Astrachan were entitled “opening,” “rebuttal” and “reply” reports.
 25 Dr. Astrachan’s second report used the title “rebuttal” report, but it was in fact an opposition
 26 report responding to Dr. Mitchell’s opening report.

27 5. Prior to October 10, 2011, neither Oracle nor Google ever attempted to serve any
 28 “rebuttal” report on a liability issue from any expert who had not previously served a “full expert

1 report[]” [Dkt. 56 ¶ 8], a “damages report” [Dkt. 56 ¶ 9], or a “revised damages report” [Dkt. 230
2 at 15].

3 6. Between September 13 and September 16, 2011, Google and Oracle conducted a
4 meet and confer concerning whether various issues relating to damages experts, including
5 whether Dr. Cockburn was entitled to file a “reply” brief pursuant to the Court’s July 22, 2011
6 order and the timing of Dr. Cockburn’s deposition in light of a potential reply report.

7 7. Attached hereto as **Exhibit A** is a true and correct copy of email correspondence
8 between Google's and Oracle's counsel between September 13 and September 15, 2011. This
9 correspondence contains the first part of the parties' meet and confer.

10 8. Attached hereto as **Exhibit B** is a true and correct copy of email correspondence
11 between Google's and Oracle's counsel on September 16, 2011. This correspondence contains
12 the second part of the parties' meet and confer.

13 9. Never during the parties' meet-and-confer discussion regarding damages expert
14 reports did Oracle ever assert it had the right to serve a stand-alone "rebuttal" report from an
15 expert who had never previously offered an opening expert report, or inform Google it was
16 planning to do so. Google never agreed that Oracle could serve "rebuttal" reports.

17 I declare under penalty of perjury that the foregoing is true and correct and that this
18 declaration was executed at San Francisco, California on October 21, 2011.

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By: /s/ Daniel Purcell
DANIEL PURCELL

EXHIBIT A

David Zimmer

From: Daniel Purcell
Sent: Thursday, September 15, 2011 11:15 PM
To: Steven Holtzman; Google-Oracle-Service-OutsideCounsel@KSLAW.com; DALVIK-KVN
Cc: Oracle-Google; OracleMoFoServiceList@mofo.com
Subject: RE: Oracle v. Google - Damages Report - Highly Confidential/Attorneys' Eyes Only

Steve, as you know I wasn't at this morning's hearing, but none of our team who were there remember Judge Alsup saying anything about whether we could file a Daubert motion. On the reply report, we think you should go ahead and do one a week after our report. Are you willing to put up Professor Cockburn for two depositions?

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As to deposition locations: Boston for Cockburn; still checking on Shugan.

BTW, I noticed that you didn't answer the two questions in my e-mail last night. In the interim, Judge Alsup answered the second one at the hearing today (Google may submit an in limine motion only), so no need for you to answer that one from our standpoint. We look forward to your thoughts on the reply issue.

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Shugan: September 21, 22, 26

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Thanks.

From: Jason Lipton [mailto:jlipton@BSFLLP.com]
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Counsel-

Please see the attached expert report of Iain M. Cockburn as well as the supporting documents which are listed in the attached declaration of service.

Jason Lipton
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BOIES, SCHILLER & FLEXNER LLP
1999 Harrison Street, Suite 900
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Direct: (510) 874-1111
Fax: (510) 874-1460
Email: jlipton@bsfllp.com<<mailto:jlipton@bsfllp.com>>

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EXHIBIT B

David Zimmer

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To: Steven Holtzman; Google-Oracle-Service-OutsideCounsel@KSLAW.com; DALVIK-KVN
Cc: Oracle-Google; OracleMoFoServiceList@mofo.com
Subject: RE: Oracle v. Google - Damages Report - Highly Confidential/Attorneys' Eyes Only

Steve, we'll take Dr. Shugan on the 22nd in the Bay Area. With respect to Dr. Cockburn, since you are not willing to produce him twice, and reserve the right to submit a reply report, we have little practical choice but to wait and take his deposition. Since your assertion of a right to a reply report is preventing us from deposing Dr. Cockburn until after Dr. Leonard submits his report, we expect that Dr. Cockburn will in fact submit a formal reply report if he has any rebuttal opinions.

Thanks.

From: Steven Holtzman [sholtzman@BSFLLP.com]
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Dan

Thanks for the clarification of your thinking about reply reports. Just so we're all clear, we now understand that you will not object to our submission of damages reply/rebuttal reports, should we elect to submit any.

We think there should be only one deposition of Professor Cockburn. It seems to us Judge Alsup has made the one-deposition process clear, and that you can decide whether to do it before your report is due or later.

Dr. Shugan could come to the bay area for deposition on September 22, but otherwise would prefer Florida.

We of course reserve the right to object to or seek to strike any Daubert motion. It seems to us that what Judge Alsup said yesterday confirmed what you had already seemed to be assuming in connection with your interpretation of the July 22 order, though obviously you can interpret both as you wish. Please let us know if you have other thoughts, whether for the sake of efficiency or otherwise.

Steve

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